05-200

No.

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross Blue Shield,

Petitioner,

- against -

DENISE FINN MCVEIGH, as Administratrix
of the Estate of Joseph E. McVeigh,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in affirming a district court finding of lack of subject matter jurisdiction under the pleadings and facts presented in this case?

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STATEMENT OF THE CASE

This is a simple contract dispute over the amount of money Empire is owed in reimbursement from the proceeds of the settlement of a personal injury case.

Contrary to Empire's sweeping assertions, this simple monetary dispute, that could have easily been handled in state court or as an Estate claim, does not involve any compelling federal interest and certainly does not deserve the attention of this Court.

On April 18, 2003, Empire filed its complaint in the United States District Court For the Southern District of New York[1] seeking to obtain reimbursement of $157,309.06 it paid in medical benefits on behalf of a now deceased, former enrollee in it's health benefits plan, from the proceeds of a settlement obtained on behalf of the former enrollee and his Estate. J.A. A6.

Despite the fact that Empire's complaint claims to be based on subrogation and right-of-recovery provisions of its Service Benefits Plan, the complaint seeks a formal "lien" against the settlement proceeds and also appears to seek reimbursement not only from the enrollee's Estate, but also from his widow, individually. In addition, it's claim of $157,309.06 appears to contain triple billings and other charges that would

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[1] It is noted, and of some significance, that, not only did Empire consent in Court to the settlement of the underlying personal injury case, but also made the voluntary election to bring this action in federal court, as opposed to state court, or as a claim against the Estate in Surrogates' Court. J.A. A914-917.

not be recoverable because they are not related to medical treatment rendered to the former enrollee as a result of injuries sustained in the accident. J.A. A831-834.

The Respondent did not serve or file an Answer to Empire's complaint, but rather moved to dismiss the action pursuant to FRCP Rules 12 and 56 for lack of subject matter jurisdiction, failure to state a claim, summary judgment and expiration of the Statute of Limitations. J.A. A811-827.

The Respondent has never denied that Empire has a right of subrogation, nor has the Respondent ever denied that Empire has a right of recovery. What the Respondent disputes is Empire's right to a "lien"; its right to a recovery against the widow individually and, most importantly, its right to recover the full amount of its claim. J.A. A807, 824-826, 836.

On September 18, 2003, the district court issued an Opinion & Order (App. D, 54a-62a), dismissing this action for lack of subject matter jurisdiction, stating that this "breach of contract and declaratory judgment action between private parties does not raise a federal question." Id, 62a.

The Petitioner appealed from that Opinion & Order and, on January 14, 2005, the Second Circuit Court of Appeals affirmed the dismissal. Two of the three Circuit Judges of the Second Circuit found, under the specific facts of this case, that the District Court did not have subject matter jurisdiction over this case under either the FEHBA statute as written, nor the two-pronged test enunciated by this Court in Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

On this application, the Petitioner does not argue that the FEHBA statute is unconstitutional, nor does the Petitioner argue

that the Boyle test was misstated by the Second Circuit. What Empire argues is that the Second Circuit made erroneous factual findings and "seriously errs in both its statutory and Boyle analyses" in it's jurisdictional analysis of the facts of this particular case. Pet. 10.

The Petitioner, however, overlooks the fact that the Second Circuit decision was case-specific and limited to the facts and proof presented to it in this particular case, principally Empire's own failure, in this case, to properly plead or prove the elements necessary to satisfy the Boyle test, so as to invoke the subject matter jurisdiction in the federal courts. More specifically, it was Empire's failure to properly plead or demonstrate any "actual, significant" conflict between New York State law and the federal interests underlying the FEHBA recovery provisions, so as to satisfy the second prong of the Boyle test, that resulted in the dismissal of its case.

There was no error by the Second Circuit. The lack of jurisdiction was based upon Empire's own failure of proof.

The Petitioner further argues some "compelling federal interest" in this simple monetary dispute and that the Second Circuit decision "throws into disarray a nationwide federal program affecting millions of people." Pet. 13.

However, here again, Empire has failed to present any proof whatsoever to support such a catastrophic assertion. Such a claim amounts to no more than sheer speculation.

It is submitted that the factual, and case-specific, decision-making of the District Court and the Second Circuit should not be reviewed by this Court. It is further submitted that the Petitioner fails to demonstrate any compelling reason,

beyond mere speculation, to justify discretionary review by this Court and that, in any event, the Court of Appeals decision, based upon the specific facts and proof in this case, was correct.

CLARIFICATION OF THE RECORD

The Petitioner, in an effort to convince this Court that there is some compelling federal interest in this simple monetary dispute, repeatedly refers to its Service Benefit Plan as a "federal government contract", whose terms "were promulgated by OPM and are part of the government contract". Pet. i, 2, 3.

However, there is no proof in this record to demonstrate that the federal government, including the OPM, or any federal statute, actually set forth the terms of Empire's Service Benefit Plan. Contrary to the Petitioner's assertions, it appears that the terms of that Plan were promulgated by Empire.[2]

REASONS FOR DENYING THE WRIT

1. EMPIRE HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right,

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[2] as demonstrated by the fact that the "Statement of Benefits" was not part of the OPM-BCBSA contract, but was incorporated by reference. In addition, the Plan terms speak of a "lien" which is an unauthorized expansion of the FEHBA statute.

but of judicial discretion". "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

The Petitioner is claiming in this case some "compelling" federal interest that deserves the attention of this Court because the lower court decision "potentially throws into disarray a nationwide program affecting millions of people".

The Petitioner offers no proof whatsoever to support such a sweeping claim; not one single example of how adjudication of these claims in the state courts resulted in any divergent decisions among the states; not one single example of any "uncertainty and disparate treatment that will result if the court of appeals' decision is allowed to stand"; not one example of any "discrepancy in treatment between the resident of the Second Circuit and other FEHBA enrollees." Pet. 13-14. The entire discussion by Empire of the claimed "disarray ... affecting millions of people" has no factual basis whatsoever.

Such a claim is nothing more than mere speculation "about the various harms that 'might' result from state-by-state adjudication of suits brought by insurance carriers under FEHBA-authorized contracts." App. 7a.

As correctly found by the Second Circuit, there is nothing to support the Petitioner's audacious claim that there are any vast differences in the common law of contracts among the states, that would result in divergent decisions in different cases. App. 8a. As stated by this Court, "[b]ecause contract law is not at its core diverse, nonuniform, and confusing", there (is) "no large risk of nonuniform adjudication inherent in [s]tate-court enforcement of the terms of a uniform agreement ... entered into ... nationwide." See American Airlines v. Wolens, 513 U.S. 219, 233 n.8 (1995).

There is nothing in this simple contract claim, beyond sheer speculation, to show any compelling reason for this Court's discretionary review of this case.

2. EMPIRE HAS NOT SHOWN A REAL CONFLICT BETWEEN THE CIRCUITS, ONLY DIFFERING RESULTS BASED UPON DIFFERENT FACTS

In support of this petition, Empire claims a stark conflict between the Second Circuit decision and the decisions of two other circuits. Pet. 10-12. It is submitted however that the opinions asserted in the several Circuits are not as dissimilar as Empire claims.

In all of the cases, when analyzing the second prong of the Boyle test, namely whether there was a showing of an "actual, significant" conflict between state law and the federal interests underlying the FEHBA recovery provisions so as to confer subject matter jurisdiction, the several Circuits correctly examined the specific facts in their respective cases in making their analysis and arrived at different decisions based on those facts. While they arrived at different results, they did so correctly, based on the specific facts before them.

Indeed, the Second Circuit acknowledged that Empire might have achieved a different result had it properly pleaded and proved it's case, when the Court stated, "We recognize the possibility that at a later stage in the proceedings, a significant conflict might arise between New York state law and the federal interests underlying FEHBA, such that the dispute would satisfy both prongs of Boyle." App. 8a. The Court, however, correctly found that "This possibility, however, is insufficient to confer federal jurisdiction." App. 8a. (See also, the concurring opinion of Circuit Judge Sack, where he states that the Court's decision

in this case is based, correctly, on the specific facts of this case, as presented to it by the Petitioner, and that as such, when presented with a different situation, the Court would not necessarily be bound by their analysis. Pet. App. 26a.)

In both of the cases relied upon by the Petitioner to show a conflict between Circuits, namely Cruz and Ochs, the Seventh Circuit and Eighth Circuit respectively were provided with, and based their decisions on, specific state laws that significantly conflicted with the FEHBA recovery provisions.

In this case, the Petitioner, unlike in the Cruz and Ochs cases, has never identified to any court, including this Court, any state law that is alleged to be in conflict with the Federal statute, or any Federal policy or objective. In this regard, the Second Circuit decision specifically found that "regardless of the strength or importance of the federal interests at stake, Empire has failed to demonstrate that the actual operation of New York state law creates an 'actual, significant conflict' with those interests" and that "Tellingly, Empire's briefs on appeal fail to mention a single state law or state-imposed duty that runs contrary to the federal interests asserted in this case." App. 7a.

As such, it is clear that it is Empire's own failure of proof, in this specific case, that distinguishes this case from the cases in the Seventh and Eighth circuits.

3. EMPIRE HAS FAILED TO SHOW A CLEAR AND MANIFEST INTENT ON THE PART OF CONGRESS TO CONFER JURISDICTION OVER PRIVATE BREACH OF CONTRACT ACTIONS BETWEEN PRIVATE INSURANCE COMPANIES AND THEIR BENEFICIARIES

When Congress enacted the FEHBA statute, it explicitly gave the district courts original jurisdiction over FEHBA-related civil actions or claims when those actions or claims are "against the United States". What Congress did not do in the FEHBA statute, although it clearly could have, was to create a private right of action in the federal courts for a health insurer to assert the type of claim that is asserted by Empire in this case.

In contrast, and as a striking example of Congressional intent, when Congress enacted the ERISA statute, 29 U.S.C. §1132(e), it explicitly gave the district courts "exclusive jurisdiction of civil actions under this subchapter ..."

While the grant of federal jurisdiction over one category of claims does not necessarily strip federal courts of their jurisdiction over another category of claims, it does clearly demonstrate that Congress considered jurisdictional issues when it enacted FEHBA and ERISA, and that it did not hesitate to expressly confer jurisdiction where it found it necessary to do so, i.e. in ERISA, but not in FEHBA.

In providing in FEHBA for an express grant of jurisdiction in the district courts for actions "against the United States", there is a strong presumption that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly, Mertens v. Hewitt Assocs., 508 U.S. 248 at 254, particularly in light of its express grant of "exclusive jurisdiction of (all) civil actions" in ERISA.

Stated differently, it is anything but clear that Congress intended for there to be jurisdiction in the federal courts for contract disputes under FEHBA, otherwise Congress could have expressly conferred jurisdiction as it did in the ERISA statute.

To the contrary, it appears clear that Congress intended for the interpretation and application of the particular provisions of health insurance contracts, issues that are traditionally regulated by the states, to be heard in state and not federal court.

As so succinctly stated by the Second Circuit,

> "If Congress intended for this case to be heard in federal court, it could have created a private right of action for suits against FEHBA beneficiaries; it could have vested jurisdiction over these claims in the federal courts; or it could have included an affirmative grant of authority to the federal courts to create a body of federal common law. Congress did none of these things." App. 24a.

CONCLUSION

Empire, by its counsel, consented in state court to the settlement of the underlying personal injury action, with the proviso that it would assert its reimbursement claims in a separate action within 30 days. J.A. A914-917. Empire could have asserted it's reimbursement claim in the state court where that action was pending, or in the state Surrogates' Court (as a claim against the Estate), but instead made the voluntary election to bring this action in the federal district court, subject to federal jurisdiction to hear the claim. J.A. A914-916.

When faced in the court of its choice to an objection to jurisdiction, Empire totally failed to plead, prove, demonstrate or even mention any facts that would have conferred jurisdiction in that court to hear that claim, i.e. facts establishing an actual conflict between state law and the federal interests that would

have satisfied the second prong of the Boyle test.

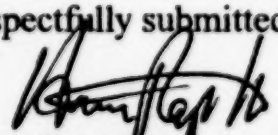
And, when faced with a dismissal of its case on jurisdictional grounds, it implores this Court to hear the case, based upon unsubstantiated speculation that this dismissal will somehow throw the federal health benefit system into chaos.

The dispute in this case does not involve the interpretation of any federal statute or federal law; it does not involve the application of any federal law, nor any conflict between state law and federal interests; nor will the dismissal of this case, being case-specific, throw the federal health benefit system into chaos.

In truth, the dispute in this case is a simple contract dispute over money that could have easily and quickly been resolved in state court. In essence, the only reason we are now before this Court is because Empire wanted a sweeping federal appellate decision placing all health benefit disputes in federal, as opposed to state court, regardless of the facts, or merits, of its claims.

Respectfully, the Petition should be denied.

Respectfully submitted,



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